

**THE MEDIATION MIRACLE: Making Mediation Work**  
*by David C. Nutter*

“That was a miracle. I didn’t think we had a chance of settling this case.” So the satisfied lawyer confides to the mediator after his client has departed with a satisfactory settlement leaving behind a contentious multi-year litigation. Now, I happen to believe in miracles, and whenever disputing parties voluntarily choose to put aside years of rancor and embrace peace, there is a touch of the supernatural. But it is helpful to recognize that we, as lawyers and mediators, can take steps to improve the odds of a “mediation miracle.”

The first step is managing the parties’ expectations. Human beings, of both the plaintiff and defendant variety, hate surprises. A mediation miracle becomes more likely if clients have realistic expectations about what will happen at the mediation. I typically tell the parties in opening statement that they should be prepared to reach a gap later in the mediation where the plaintiff has come down as far as they want to and the defendant has come up as far as they want to, but the numbers still do not intersect. They need to know

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that this is normal and that in order to settle the case, both parties will need to compromise and move past their “bottom lines.” They also need to know that they will not leave the mediation “happy.” They will leave with a compromise which by definition is a result that neither party wanted. Knowing this at the beginning makes it much more likely to be accepted at the end.

The second step is client emancipation. If you wish to maximize the potential of a mediation miracle, the clients must be affirmatively given their freedom. Freedom to leave, freedom to go to trial, freedom to disregard their lawyer’s advice, freedom to ignore the mediator’s evaluation and freedom—to settle. Lincoln’s Emancipation Proclamation did not, in 1862, actually free anyone, but it had crucial psychological force that led to the emancipation of millions. Clients should receive a similar emancipation proclamation at the very outset of a mediation. A client is far more likely to embrace a settlement that they believe is their idea, rather than an idea foisted on them by another, especially their

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litigation opponent. So, for mediators and advocates this means that at the very beginning, before a joint session begins, the client should be told this very truth—that they control the day’s destiny. If lawyer and mediator do this at the beginning of the day, the client is much more likely to take the advice of the lawyer and mediator at the end of the day—as an exercise of the client’s freedom.

Closely associated with client emancipation is the third step—client validation. The best way for the mediator and lawyer to prove to the client that he or she is indeed free, is to let the client speak from the heart. So often this is the main thing a party really wants: the freedom to share their heart about a conflict and to be listened to. This exercise of freedom alone often will lead to an unexpected settlement later in the day. A party is much more likely to listen to a mediator at the end of the day, when the mediator listened to the party at the beginning of the day.

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How we say what we say, as attorneys and mediators, is a fourth vital step. “[A] soft tongue breaks the bone,” says the Proverb. But it is not an easy trick for the advocate called to be zealous. The mediator can help by explaining to the parties at the outset that the attorneys will use calm tones to state their positions instead of the flaming oratory of trial because neither side is trying to persuade a jury, but is engaging in the more difficult task of appealing to their opponent. Angering an opponent does not bring voluntary resolution. Taking this lead, the attorneys then have the leeway to use calm tones to state their client’s position without upsetting either the opponent or their own client. Further, the mediator

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can explain up front that the attorneys are simply doing their jobs, it is nothing personal, and the clients are not expected to agree with everything the opposing attorney says. A voluntary settlement is possible for both parties without climbing the Everest of total agreement on all factual and legal points.

The last step is client focus. Parties to a suit tend to have the wrong focus. Wrong focus wrecks a mediation. “Who is right?” is the wrong focus. The right focus is “What is my trial risk?” Trials are not “reality.” Rather, they are a grainy snapshot of what really happened. Try a case one hundred times and a bell curve of different

verdicts will result. No one knows what will happen on any given day. It is critical that clients see this truth. Then they will be in a position to make a sound business decision instead of taking the risk of seeking emotional validation from twelve strangers.

Your water may not turn to wine if you follow these steps, but there is an excellent chance that your case will settle.

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